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Supreme Court, U.S.
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No. 95-611

IN THE
Supreme Court of the United States

October Term, 1995

DANIEL F. GEORGE AND MICHAEL MULVEY,
INDIVIDUALLY AND AS POLICE OFFICERS OF
THE CITY OF WORCESTER,

Petitioners,

v.

JOSEPH F. CONSOLO,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Does this case present the Court with an appropriate vehicle to decide the degree of culpability necessary to show a denial of a pretrial detainee's Due Process right to medical care?

II. Does this case present an appropriate vehicle for resolving any perceived conflict between the Fifth Circuit's "reasonable medical care" standard for pretrial detainees' Fourteenth Amendment claims of deprivation of medical attention, and the "deliberate indifference" standard employed in the First and other Circuits?

III. Is the First Circuit's decision below erroneous?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Daniel F. George and Michael Mulvey,
Individually and as Police Officers
of the City of Worcester,
Petitioners,

v.

Joseph F. Consolo,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Joseph F. Consolo respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the First Circuit's opinion in this case. That opinion is reported at 58 F.3d 791 (1st Cir. 1995).

STATEMENT OF THE CASE

A. The Facts

Petitioners' recitation of events of "The Arrest" is an exercise in selectivity which is designed to suggest to this Court that the respondent was not injured on April 9, 1990, but rather was feigning injury for the booking videocamera, and that he somehow fractured his pelvis at a later time, and fraudulently blamed the police officer petitioners. That argument failed to persuade the jury, failed to convince the trial judge on post-trial motions and failed to convince the First Circuit Court of Appeals. This Court is not an appropriate forum for a fourth bite at the evidentiary apple.

A more balanced and complete version of the relevant facts is found in the

First Circuit's opinion, and is quoted verbatim here:

> "On April 9, 1990, Consolo was driving in his pickup truck -- admittedly intoxicated -- when one of his tires went flat. Consolo kept going and, when spotted by Officer George, was driving on the rim which was emitting sparks. Officer George stopped Consolo but, when questioned, Consolo swore at him and drove off, attempting to escape. Officer George then called for back-up and five officers, in separate vehicles, responded, chasing Consolo for approximately 1.3 miles. Finally, his escape blocked by a police cruiser across the road, Consolo stopped.
>
> "At this point, the testimony diverges sharply. Consolo claims he was dragged from his pickup truck and stomped, kicked, and beaten while he lay helpless on the ground in unbearable pain from three separate fractures to his pelvis occasioned, he says, from his beating. The police witnesses took a different tack, testifying that Consolo had leapt from his pickup truck as soon as it came to a halt and that Officer George used only such

> force as was necessary to subdue and handcuff Consolo at which point Officer Mulvey and other police officers arrived. Consolo was then taken to police headquarters, booked, and ultimately brought to the hospital to receive medical treatment for what, it is undisputed, was a fractured pelvis. In closing, defense counsel argued that the medical evidence of the fracture was explained by Consolo's frantic leap from his pickup truck in an attempt to escape."

Contrary to the petitioners' assertion here, Mr. Consolo did not claim at trial that his fractured pelvis was proximately caused by the fifty minute booking delay. Rather, his claim was that three separate fractures of his pelvis were caused by a police beating, and that his pain and suffering was unnecessarily and grievously extended and exacerbated by the booking delay. The jury rejected Consolo's testimony that the police defendants had beaten him, preferring the

officers' testimony tending to show that Consolo had injured himself jumping from his truck in an attempt to escape. Nevertheless, they awarded Consolo $90,000 for the officers' delay in getting him medical attention.

On appeal to the First Circuit, the petitioners made much of an argument that while the booking delay might have modestly increased Consolo's pain and suffering, a $90,000 award for that modest enlargement was excessive. Having the advantage of seeing the booking videotape, in which Consolo's agony was evident while being mocked and forced to stand, the jury obviously believed otherwise, and the trial judge and First Circuit both concluded, having seen the videotape as well, that the award was within the realm of reason.

Now, recognizing that excessiveness of the damages is not a "certworthy" issue, the petitioners have retreated to the thrice-failed scenario that Mr. Consolo was performing for the camera.

B. Proceedings Below

On the issue of deliberate indifference to medical needs, the trial judge charged as follows:

> "Now, the term 'deliberate indifference.' Plaintiff also claims that he was denied adequate medical care after his arrest. Deliberate indifference to serious medical needs of prisoners violates the constitutional right of due process of law. Deliberate indifference is more than a showing of negligence. Rather, it has been described as gross negligence or reckless disregard. The idea of deliberate indifference might be expressed in two ways. One is to disregard intentionally and deliberately the duty to act in a certain way, and the other is to be intentionally and deliberately indifferent to whether or not there is a

duty and to whether or not some action is needed to perform that duty.

"Thus, if you find that the defendants were aware that plaintiff was seriously in need of medical attention and failed to provide access to medical personnel or intentionally delayed such access, or if you find that defendants intentionally failed to cooperate with medical personnel who did see the plaintiff, then you should find that the defendants are liable for a violation of plaintiff's constitutional rights in that regard. Although mere negligent or inadvertent inattention to plaintiff's medical needs does not amount to a violation of his constitutional rights, if you find that the defendants deliberately assumed a posture of indifference to his medical needs, you must find them liable for a violation of his constitutional rights."

The petitioners did not object to this instruction. They had neither requested nor suggested an instruction at variance with this instruction. They did

not ask for any modification or amplification of the special jury question crafted by the trial judge on deliberate indifference, but rather expressed satisfaction with all of the court's proposed jury questions. Finally, petitioners' post-trial motions for judgment notwithstanding the verdict and for a new trial specifically acknowledged the correctness of the trial court's charge on deliberate indifference. (See attached).

It was not until four months after the entry of judgment that the petitioners unveiled the argument that deliberate indifference should have been defined in a criminal law sense, rather than a tort law sense, in a motion for reconsideration of their j.n.o.v. and new trial motions.

REASONS WHY THE WRIT SHOULD BE DENIED

I. IS THIS CASE THE FOURTEENTH AMENDMENT COUNTERPART TO CANTON V. HARRIS?

If the First Circuit had affirmed a trial judge who had simply instructed a jury that "deliberate indifference equals gross negligence", and who had then proceeded to define "gross negligence" in traditional terms, this case might, as claimed by the petitioners, present an appropriate vehicle for examining an issue left open in Canton v. Harris, 489 U.S. 378 (1989): the degree of culpability needed by a pretrial detainee to make out a Fourteenth Amendment violation based on the withholding of medical care.

That did not, however, happen in this case. True, as noted by the First Circuit, the trial judge did begin his exposition of "deliberate indifference" by noting that it is more than negligence, and that "it has been described as gross negligence or reckless disregard," but he immediately followed with a definition of "deliberate indifference" that is unassailable, and, indeed, is one with which even the petitioners have no complaint.

The petitioners invite this Court, as they invited the First Circuit, to examine the trial judge's brief and isolated reference to gross negligence in a vacuum. The First Circuit declined that invitation and found the instructions to be adequate when considered in their entirety.

Even if the trial judge had simplisticly equated deliberate indifference with gross negligence, this case would not be a suitable vehicle for expanding Canton v. Harris to Fourteenth Amendment - pretrial detainees because the petitioners utterly failed to complain about the charge or otherwise preserve the point at trial. The petitioners did not ask the trial court for the definition of deliberate indifference they now champion; they did not complain about the instructions as given, but rather expressed complete accord with the judge's charge, with one minor exception not relevant here; and they did not complain about the instructions in their post-trial motions for judgment n.o.v. or for a new trial. The petitioners bring to this Court an inappropriate vehicle for sweeping changes.

If this Court were inclined to visit the issue of the scope of deliberate indifference in the pretrial detainee/ Fourteenth Amendment context, it should await a case in which the trial judge's charge is black or white, but not some shade of grey, and in which the party claiming to be aggrieved has saved his or her rights.

II. SHOULD THIS COURT TAKE THIS CASE IN ORDER TO ADDRESS PERCEIVED CONFLICTS BETWEEN THE FIFTH AND OTHER CIRCUITS?

This case is not an appropriate vehicle for resolving perceived conflicts between the Fifth and other Circuits. The petitioners concede that the Fifth Circuit standard, "reasonable medical care", described in Hare v. City of Corinth, MS, 36 F.3d 412 (5th Cir. 1994),

is more protective of pre-trial detainees than the deliberate indifference standard applied below, and in the Fourth, Sixth, Eighth and Tenth Circuits.

The petitioners therefore benefited from any failure of the courts below to apply a standard more protective of pre-trial detainees. If this Court were inclined to consider whether there exists a direct and important conflict among the circuits on this issue, and to resolve that conflict one way or the other, it should await a case from the Fifth Circuit in which a defendant is actually aggrieved by the trial court's application of the standard more protective of pretrial detainees, or a case from one of the other circuits in which a plaintiff is actually aggrieved by the use of the less protective

standard. The petitioners here, having benefited from the standard applied below, simply lack standing to invoke the claimed conflict.

Put differently, a choice by this Court that the Fifth Circuit standard is correct and the deliberate indifference standard is wrong would not entitle the petitioners to a new trial or otherwise affect the result below. Obviously, were this Court to choose against the Fifth Circuit standard, it would follow that the result below was correct.

That petitioners have no legitimate interest in the "conflict" issue they now champion is demonstrated by their failure to cite Hare v. City of Corinth, MS, supra, to the trial court or the First Circuit. The issue may be interesting, but it is not the petitioners' issue.

III. WAS THE JUDGMENT BELOW ERRONEOUS?

While it has long been clear that this Court has broader concerns than the correction of "mere" error, it is also true that the presence of error is sometimes a factor in the granting of certiorari. Therefore, respondent briefly addresses petitioners' third point, that the First Circuit's decision was wrong.

The First Circuit did not err in refusing to condemn the trial judge's definition of deliberate indifference because that definition, considered in context, adequately conveyed to the jury the elements essential to a finding that the petitioners acted with such recklessness as to constitute deliberate indifference. That definition enjoys

support in the First Circuit, Manarite v. City of Springfield, 957 F.2d 953 (1st Circuit 1992); Fourth Circuit, Yuam, 739 F.2d 160 (4th Cir. 1984); Sixth Circuit, Danese v. Asman, 875 F.2d 1239 (6th Cir. 1989); Seventh Circuit, Salazar v. City of Chicago, 940 F.2d 233 (7th Cir. 1991); Eighth Circuit, Ervin v. Busby, 992 F.2d 142 (8th Cir. 1993); Ninth Circuit, Jones v. Johnson, 781 F.2d 769 (9th Cir. 1986); and Tenth Circuit, Garcia v. Salt Lake County, 768 F.2d 303 (10th Cir. 1985). Its use below, perceived conflicts with the Fifth Circuit aside, was hardly error.

Neither was it error for the First Circuit to consider the instructions as a whole rather than isolating the trial judge's brief mention of gross negligence, particularly where the petitioners approved the instruction at trial and

failed to complain about it until four months later, in a motion for reconsideration.

Nor was it error for the First Circuit to reject the petitioners' qualified immunity argument. The conduct under consideration took place in 1990. Seven years earlier, in 1983, this Court had established, in City of Revere v. Massachusetts Gen'l Hosp., 463 U.S. 244 (1983), that pre-trial detainees are constitutionally entitled to medical attention for serious medical needs. It is folly, given the dramatic videotape evidence favorable to Consolo, to argue that the petitioners' conduct was objectively reasonable, given the constitutional understandings then current.

Petitioners' remaining arguments to the First Circuit, that their motion for a

new trial should have been allowed, and that the damages should have been reduced, were both fact-driven, and have not been presented to this Court as certworthy.

Neither of the petitioners' claims of error to this Court has merit. The case is an unremarkable example of the difficult burdens an appellant faces when he fails to save his rights.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 92-40047XX (GN)

JOSEPH F. CONSOLO,
Plaintiff,

V.

DANIEL F. GEORGE, MICHAEL MULVEY, AND JOHN DOE, an unknown police officer in the City of Worcester, individually and as police officers, City of Worcester and THE CITY OF WORCESTER MASSACHUSETTS,
Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTIONS FOR NEW TRIAL OR IN THE ALTERNATIVE FOR REMITTITUR

I. STANDARD OF REVIEW

Rule 59 of the Federal Rules of Civil Procedure recognizes the common law principle that a trial judge, who is not satisfied with a jury verdict, has a duty to set it aside and grant a new trial so that justice is served. Klein v. Auto Owners Insurance Co., 39 F.R.D. 24 (D.C. Minn., 1965). A Federal District Court judge has the discretion to grant a new trial if the verdict appears to be against the weight of the evidence. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 78 S. Ct. 893 rehearing denied 357 U.S. 933, 78 S. Ct. 1366 (1958). In fact, when the verdict is against the clear weight of the evidence, it is the duty of the trial judge to set it aside. Dunkin v. Dunkin, 377 F. 2d 49 cert. denied 389 U.S. 913, 88 S. Ct. 239 (1967); Bedwell v. Grand Trunk Western R. Co., 226 F. 2d 150 (1955); Magee v. General Motors Corp., 213 F. 2d 899 (1954).

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B. THIS COURT SHOULD GRANT DEFENDANTS' MOTIONS FOR A NEW TRIAL BECAUSE THE JURY VERDICT WAS UNJUST AND THE RESULT OF PASSION, PREJUDICE AND SYMPATHY.

1. The Jury's Responses To The Verdict Questions Were Inconsistent.

The jury's answers to the verdict questions, although appearing to be facially consistent, are, in fact, contradictory when read in conjunction with the Court's charge to the jury and the applicable law. The Court instructed the jury that:

> Deliberate indifference is more than a showing of negligence. Rather, it has been described as gross negligence or reckless disregard. (emphasis added)

Thus the Court properly instructed the jury that deliberate indifference must involve either gross negligence or recklessness. The Court also charged the jury that gross negligence:

> . . . amounts to indifference to present legal duty. (emphasis added)

Thus the Court equated gross negligence with indifference. The Court also defined intentional conduct to include deliberate conduct:

> An act is intentional if it is done knowingly, that is if it is done voluntarily and deliberately. . . (emphasis added)

The jury answered yes to the question of whether the defendant police officers exhibited deliberate indifference to Consolo's medical needs after his arrest. The jury answered no, however, to the questions of whether the defendants intentionally or recklessly violated Consolo's constitutional rights and whether defendants were grossly negligent. Given the